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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

17 NEETA THAKUR, *et al.*,) Case No. 25-cv-4737-RFL
18 Plaintiffs,)
19 v.)
20 DONALD J. TRUMP, in his official capacity as)
President of the United States, *et al.*,)
21 Defendants.)
22)
23)
DEFENDANTS' SUPPLEMENTAL BRIEF
REGARDING THE SUPREME COURT
DECISION AND NINTH CIRCUIT STAY
ORDER
Hearing Date: September 18, 2025
Time: 2:30 pm
Judge: Hon. Rita F. Lin
Location: Zoom

INTRODUCTION

Two weeks ago, the Supreme Court held that “[t]he Administrative Procedure Act’s ‘limited waiver of [sovereign] immunity’ does not provide the District Court with jurisdiction to adjudicate claims ‘based on’ the research-related grants.” *NIH v. Am. Pub. Health Ass’n*, No. 25A103, 2025 WL 2415669, at *1 (U.S. Aug. 21, 2025) (quoting *Dep’t of Educ. v. California*, 145 S. Ct. 966, 968 (2025)). Plaintiffs previously described this matter as having “nearly identical facts” as the *NIH* case. Opp’n Stay Mot. at 8, *Thakur v. Trump*, No. 25-4249 (9th Cir. July 22, 2025), ECF Dkt. 11-1. *NIH*, and Plaintiffs’ concession that this case is on all-fours with *NIH*, together definitively resolve Plaintiffs’ proposed Form Termination Class, which is based on the Administrative Procedure Act’s (“APA”) limited waiver. *NIH* “squarely control[s]” this materially identical case. See *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (per curiam).

The Ninth Circuit’s stay order, issued hours prior to the Supreme Court’s ruling, cannot save Plaintiffs’ case. *Thakur v. Trump*, No. 25-4249, 2025 WL 2414835 (9th Cir. Aug. 21, 2025).¹ While the Ninth Circuit understood the *California* case to be inapplicable here, *NIH* in every material respect supersedes the Circuit’s reasoning.

Nor does it matter that Plaintiffs are not parties to these grant agreements, as was true for several plaintiffs in *NIH*. See Letter Br. at 1, ECF No. 102 (arguing that nonparty status distinguishes *NIH*). Indeed, the *NIH* individual researchers unambiguously raised this exact issue in the First Circuit, stating “they are not parties to any NIH grant agreements.” Opp’n Stay Mot. at 13-14, *Am. Pub. Health Ass’n v. NIH*, No. 25-1611 (1st Cir. July 8, 2025), ECF Doc. 00118310408. They argued that the result of this nonparty status was that, without district court review, they would have no court in which to seek relief. *Id.* They then generally raised the same issue to the Supreme Court, explaining “if Defendants prevail on their argument that the district court here lacked jurisdiction, *no* court will have jurisdiction to hear Plaintiffs’ claims” because they are “without contracts to sue on.” Opp’n Stay Mot., *NIH*, No. 25A103, 2025 WL 2244206, at *29. The Supreme Court issued a stay anyway, on the grounds the Tucker Act

¹ On September 4, 2025, Defendants moved for panel reconsideration or reconsideration *en banc* of the panel's stay order as it applies to Plaintiffs' proposed Form Termination class. Pet. for Panel Recons. or Pet. for Reh'^g En Banc at 3 n.1, *Thakur*, No. 25-4249 (9th Cir. Sep. 4, 2025), ECF Dkt. 51-1.

1 precluded relief.

2 Next, the Equity Termination Class is also foreclosed. *NIH*'s holding on the APA's waiver of
 3 sovereign immunity bars Plaintiffs' contrary to law claims. And it should also apply to the First
 4 Amendment claims.

5 Finally, no preliminary injunctive relief may issue given the Supreme Court's balancing of the
 6 equities in *NIH* and the Supreme Court's recent instructions that the Supreme Court's disposition of stay
 7 applications controls similar cases. Since Plaintiffs have not promised to pay back any money wrongfully
 8 disbursed, they are not entitled to an injunction.

9 All told, the Supreme Court has now twice admonished district courts that grant terminations must
 10 be adjudicated in the Court of Federal Claims. *California* and *NIH* control. This Court should at the very
 11 least not issue relief premised on the Form Termination Class. And if it fully embraces the principles in
 12 the Court's two opinions, it should foreclose the Equity Termination Class as well.

13 ARGUMENT

14 I. Sovereign Immunity Bars Claims Absent a Waiver

15 "The United States, as sovereign, is immune from suit save as it consents to be sued." *United*
16 States v. Sherwood, 312 U.S. 584, 586 (1941). To sue a federal agency and its officials, a plaintiff must
 17 therefore identify a waiver of sovereign immunity and show that its claim falls within the waiver's scope.
 18 See *FAA v. Cooper*, 566 U.S. 284, 290 (2012). So "if one wishes to sue the United States for a wrong
 19 committed by one of its agents (and agencies), one must find an appropriate Act of Congress that waives
 20 the Government's immunity from suit for that particular wrong." *Suburban Mortg. Assocs., Inc. v. U.S.*
 21 *Dep't of Hous. & Urb. Dev.*, 480 F.3d 1116, 1121 (Fed. Cir. 2007).

22 The APA provides "a limited waiver of sovereign immunity for claims against the United States"
 23 seeking non-monetary relief. *Crowley Gov't Servs., Inc. v. GSA*, 38 F.4th 1099, 1105 (D.C. Cir. 2022).
 24 "The APA's waiver of sovereign immunity does not apply," so long as "any other statute that grants consent
 25 to suit expressly or impliedly forbids the relief which is sought." *California*, 145 S. Ct. at 968 (quoting 5
 26 U.S.C. § 702). Meanwhile, in the Tucker Act, Congress provided consent to suit and granted "the Court

1 of Federal Claims jurisdiction over suits based on ‘any express or implied contract with the United
 2 States.’” *California*, 145 S. Ct. at 968 (citing 28 U.S.C. § 1491(a)(1)). Specifically, the “United States
 3 Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United
 4 States founded” on “any express or implied contract with the United States.” 28 U.S.C. § 1491(a)(1).

5 **II. NIH Confirms that Sovereign Immunity Bars the Form Termination Class**

6 **A. NIH Directly Forecloses the Form Termination Class**

7 Shortly after the Ninth Circuit panel issued its stay ruling, the Supreme Court granted a stay that
 8 is on all fours with this case. In *NIH*, the plaintiffs brought APA claims alleging that the government’s
 9 terminations of their DEI-related research grants were arbitrary and capricious, and the district court
 10 vacated the terminations on those grounds. *Am. Pub. Health Ass’n v. NIH*, 145 F.4th 39, 43-44, 47 (1st
 11 Cir. 2025). The First Circuit denied the government’s request for a stay, concluding that the district court
 12 “likely had jurisdiction to enter the orders . . . to set aside an agency’s actions as arbitrary and capricious,”
 13 and that “the fact that the orders may result in the disbursement of funds did not divest the court of its
 14 jurisdiction.” *Id.* at 52 (cleaned up).

15 The Supreme Court disagreed. It stayed the district court’s judgment “vacating the Government’s
 16 termination of various research-related grants.” *NIH*, 2025 WL 2415669, at *1. The Court held that the
 17 APA’s “limited waiver of sovereign immunity does not provide the District Court with jurisdiction to
 18 adjudicate claims based on the research-related grants or to order relief designed to enforce any obligation
 19 to pay money pursuant to those grants.” *Id.* (cleaned up). And it further determined that the government
 20 faced irreparable harm given the “plaintiffs do not state that they will repay grant money if the Government
 21 ultimately prevails.” *Id.*

22 The Supreme Court’s reasoning stems from the nature of the APA’s limited waiver of sovereign
 23 immunity. The “Tucker Act impliedly forbids” the bringing of “contract actions” against “the government
 24 in a federal district court” under the APA. *Albrecht v. Comm. on Emp. Benefits of the Fed. Rsrvc. Emp.*
 25 *Benefits Sys.*, 357 F.3d 62, 67-68 (D.C. Cir. 2004) (quotation omitted); *see also* 5 U.S.C. § 702 (providing
 26 that APA’s waiver of sovereign immunity does not “confer[] authority to grant relief if any other statute

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1 that grants consent to suit expressly or impliedly forbids the relief which is sought”). Congress has instead
 2 vested the Court of Federal Claims with exclusive jurisdiction over most contract claims against the United
 3 States. *See* 28 U.S.C. § 1491(a)(1). “[C]allenges to the grant terminations, [thus] belong in the Court of
 4 Federal Claims.” *NIH*, 2025 WL 2415669, at *2 (mem.) (Barrett, J., concurring).

5 *NIH* “squarely control[s]” this materially identical case. *See Boyle*, 145 S. Ct. at 2654. Like in
 6 *NIH*, the Form Termination Class’s APA claims challenge grant terminations as arbitrary and capricious.
 7 And this Court’s preliminary injunction vacates “[a]ll grant terminations” meeting the Court’s
 8 requirements and orders the agencies to “**REINSTATE** the terminated grants.” Prelim. Inj. at ¶¶ 2a, 2c,
 9 ECF No. 55. The claims are thus “based on the research-related grants” through which federal funds are
 10 obligated and disbursed. *NIH*, 2025 WL 2415669, at *1 (quotation omitted). And, like the district court
 11 in *NIH*, this Court vacated the government’s termination of the grant agreements and reinstated the grants
 12 so that federal funding would continue—“relief designed to enforce [an] obligation to pay money pursuant
 13 to” the research-related grants. *Id.* (cleaned up). In sum, the Form Termination Class is based on forbidden
 14 claims and seeks forbidden relief. So *NIH* foreclosed that path to a preliminary injunction.

15 **B. The Ninth Circuit’s Stay Order Conflicts with *NIH* and Therefore Does Not Control**

16 The Ninth Circuit denied Defendants a stay mere hours before the Supreme Court issued its *NIH*
 17 decision. The panel thus acted without the benefit of *NIH*. And the panel’s reasoning has now been
 18 overtaken in relevant part. “[W]here intervening Supreme Court authority is clearly irreconcilable” with
 19 an opinion of the Circuit “district courts should consider themselves bound by the intervening higher
 20 authority” and must “reject the prior opinion.” *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003)
 21 (en banc). Further, “circuit precedent, authoritative at the time it was issued, can be effectively overruled
 22 by subsequent Supreme Court decisions that are closely on point, even though those decisions do not
 23 expressly overrule the prior circuit precedent.” *Id.* at 899 (cleaned up).

24 The panel’s reasoning is irreconcilable with the Supreme Court’s *NIH* decision in at least three
 25 ways. First, the panel determined that Plaintiffs’ claim supporting the Form Termination Class is statutory,
 26 not contractual because it is “not premised on any rights derived from their grants or any purported

1 contract.” *Thakur*, 2025 WL 2414835, at *3. In the panel’s view, the claim stems from a “right to be free
2 from arbitrary and capricious agency action” under the APA statutory scheme. *Id.*

3 But the Supreme Court concluded in *NIH* that the APA’s waiver of sovereign immunity does not
4 extend to claims challenging grant terminations as arbitrary and capricious because such claims are in fact
5 “based on the research-related grants.” *NIH*, 2025 WL 2415669, at *1 (quotation omitted). That is, the
6 Supreme Court concluded the exact opposite of the stay panel—that an arbitrary and capricious claims for
7 termination of a grant agreement is in fact contractual. As the D.C. Circuit recognized just this week, *NIH*
8 thus holds that a general right to be free from arbitrary-and-capricious decisionmaking cannot be the
9 source of the right upon which plaintiffs’ claim is premised. *See Climate United Fund v. Citibank, N.A.*,
10 No. 25-5122, 2025 WL 2502881, *8 (D.C. Cir. Sep. 2, 2025).

11 Next, the panel reasoned that the relief requested and ordered was “not contractual in nature.”
12 *Thakur*, 2025 WL 2414835, at *3. The panel acknowledged that the district court’s order vacatur of the
13 grant terminations and order of reinstatement “has the eventual effect of requiring the government to make
14 payments pursuant to the grants,” but it considered this “a mere by-product” of the order. *Id.* (quotation
15 omitted). The *NIH* decision rejected that logic as well. An “order vacating the government’s decision to
16 terminate grants under the APA is in every meaningful sense an order requiring the government to pay
17 those grants.” *NIH*, 2025 WL 2415669, at *4 (Gorsuch, J., concurring in part and dissenting in part); *id.*
18 at *1 (per curiam) (explaining relief designed to enforce any “‘obligation to pay money’ pursuant to those
19 grants” is impliedly precluded). Plaintiffs have always acknowledged that the aim of their requested relief
20 is to have the grant agreements reinstated so that they may continue to receive funds paid out by the
21 government under those agreements. That is precisely what the Supreme Court has barred.

22 Finally, the panel’s discounting of *California* has been overtaken by the Supreme Court’s
23 subsequent decision in *NIH*. The panel determined that the prior Supreme Court decision was
24 distinguishable because it involved relief requiring “the Government to pay out past-due grant obligations
25 and to continue paying obligations as they accrue[],” while relief vacating terminated grants supposedly
26 does not, *Thakur*, 2025 WL 2414835, at *4 (quotation omitted). That reasoning echoes the First Circuit’s

1 since-rejected reasoning in *NIH*. See *American Pub. Health Ass'n*, 145 F.4th at 51 (purporting to
 2 distinguish *California* on the ground that “the Supreme Court construed the district court as having ordered
 3 the Government to pay out past-due grant obligations” (cleaned up)). In *NIH*, the Supreme Court made
 4 clear that *California* “cannot be so easily circumvented.” 2025 WL 2415669, at *4 (Gorsuch, J.,
 5 concurring in part and dissenting in part); *see also id.* at *1 (per curiam) (relying on *California* in granting
 6 a stay); *id.* at *2 n.1 (Barrett, J., concurring) (noting that the “objection . . . to sending the grant-termination
 7 claims to the [Court of Federal Claims]” was “already addressed” by *California*).

8 **C. That Plaintiffs are Not Parties to the Contract Does Not Meaningfully Distinguish NIH**

9 That Plaintiffs are not themselves parties to the agreements makes no difference. “The core of
 10 plaintiffs’ suit alleges that the Government unlawfully terminated the[] grants. That is a breach of contract
 11 claim. And under the Tucker Act, such claims must be brought in the Court of Federal Claims, not federal
 12 district court.” *NIH*, 2025 WL 2415669, at *5 (Kavanaugh, J., concurring in part and dissenting in part).
 13 Despite having previously described *NIH* as “nearly identical” to this case, Opp’n Stay Mot. at 8, *Thakur*,
 14 Plaintiffs have since sought to distinguish it. They explain that they are not themselves parties to the grant
 15 agreements here. Letter Br. at 1. But that does not save them from the Supreme Court’s mandates.

16 As an initial matter, several of the plaintiffs in *NIH* were themselves individual researchers who
 17 were nonparties to the grants. *Am. Pub. Health Ass'n*, 145 F.4th at 44 (“The plaintiffs in the first case are
 18 private research and advocacy organizations and individual researchers who receive NIH funding.”).
 19 Indeed, the fact that the individual researchers were “not parties to any NIH grant agreements” was briefed
 20 in the First Circuit. Opp’n Stay Mot. at 13-14, *Am. Pub. Health Ass'n v. NIH*, No. 25-1611 (1st Cir. July
 21 8, 2025), ECF Doc. 00118310408. The individual research plaintiffs argued that, without district court
 22 review, they would have no court in which to seek relief. *Id.* And the plaintiffs in *NIH* resisted a stay in
 23 the Supreme Court on the precise ground that “if Defendants prevail on their argument that the district
 24 court here lacked jurisdiction, *no* court will have jurisdiction to hear Plaintiffs’ claims” because they are
 25 “without contracts to sue on.” Opp’n Stay Mot., *NIH*, No. 25A103, 2025 WL 2244206, at *29.

26 While the Supreme Court briefing, as opposed to the First Circuit argument, was more generally

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1 framed, the distinction is immaterial. The individual researcher plaintiffs raised in both courts that they
 2 would be foreclosed from bringing suit in the Court of Federal Claims. The contention was the plaintiffs'
 3 means of avoiding Tucker Act preclusion. And the Supreme Court did not accept that argument. Instead,
 4 the Court held that the district court likely lacked jurisdiction over all the plaintiffs' APA claims, without
 5 regard to whether they were direct or indirect recipients of grant funding, because of the nature of the
 6 claims raised and the relief sought. "The [APA's] 'limited waiver of [sovereign] immunity' does not
 7 provide the District Court with jurisdiction to adjudicate claims 'based on' the research-related grants."
 8 *NIH*, 2025 WL 2415669, at *1 (quoting *California*, 145 S. Ct. at 968). Nor does it permit "relief designed
 9 to enforce any obligation to pay money pursuant to those grants." *Id.* (cleaned up).

10 This conclusion reflects that it would not be logical to allow indirect recipients of grant funding to
 11 bring APA claims challenging the government's grant terminations while barring direct recipients. *See*
 12 *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012)
 13 (explaining that the APA's preemption-carveout provision "prevents plaintiffs from exploiting the APA's
 14 waiver to evade limitations on suit contained in other statutes"). As the Supreme Court has long
 15 recognized, when Congress establishes a remedial scheme with limitations on the parties who can seek
 16 relief, the proper inference is not that other parties can seek relief without regard to the remedial scheme's
 17 limitations, but rather that other parties cannot seek relief at all. *See Block v. Cnty. Nutrition Inst.*, 467
 18 U.S. 340, 345-47, 349 (1984) (declining APA review over a challenge to the Agricultural Marketing
 19 Agreement Act of 1937 because by limiting challenges to the Act to a particular class, the Act "impliedly
 20 precluded" judicial review over similar challenges by those outside the class).

21 And in the Tucker Act context, that a party may be unable to receive relief in the Court of Federal
 22 Claims is not itself a basis to defeat implied preclusion of APA claims. When considering the APA's
 23 limited waiver of sovereign immunity, that a plaintiff "does not have an adequate remedy elsewhere does
 24 not end [the court's] discussion." *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 646 (9th
 25 Cir. 1998). Implied preclusion is centered on a "a cause of action" and whether it is "impliedly forbidden."
 26 *Id.* (cleaned up). To appeal to whether that same plaintiff has an adequate remedy in the Court of Federal
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1 Claims “conflates [the] two distinct concepts.” *Id.* The focus is not on what may be brought in the Court
 2 of Federal Claims, but rather on the nature of the claims and relief.

3 That a set of potential plaintiffs may be impliedly precluded from bringing any claims is not
 4 unusual. Consider, by way of example, preclusion under the Civil Service Reform Act of 1978 (“CSRA”).
 5 It is commonplace that the “comprehensive [statutory] employment scheme preempts judicial review
 6 under the more general APA even when that scheme provides no judicial relief—that is, what you get
 7 under the CSRA is what you get.” *Filebark v. DOT*, 555 F.3d 1009, 1010 (D.C. Cir. 2009) (cleaned up).
 8 As then-Judge Roberts explained for the D.C. Circuit, the CSRA in some circumstances will properly
 9 provide a set of plaintiffs “no relief and preclude[] other avenues of relief.” *Graham v. Ashcroft*, 358 F.3d
 10 931, 935 (D.C. Cir. 2004). “[W]e treat the CSRA and Congress’s related employment statutes as covering
 11 the field of federal employee claims, and so our cases expressly teach that those left out of this scheme
 12 are left out on purpose.” *Filebark*, 555 F.3d at 1014; *accord Am. Fed’n of Gov’t Emps. v. Sec’y of Air*
 13 *Force* (“*Air Force*”), 716 F.3d 633, 638 (D.C. Cir. 2013) (“[T]he fact that [a union] may not pursue a claim
 14 through the CSRA does not mean that it has access to the courts[] . . . [it] may not raise the claim at all.”).

15 The CSRA is not a precise analogue, but it illustrates the general principle. There, that employees
 16 must go through a specific scheme, the CSRA, prevents other affected parties, like federal unions, from
 17 bringing suit under the APA. See *Air Force*, 716 F.3d at 639. “Were [the Court] to hold otherwise, a union
 18 [employee] could circumvent the CSRA’s strictures by requesting that a [federal] union file general APA
 19 claims outside the CSRA.” *Id.* And the same is ultimately true in this context. Were the Court to reject
 20 both *California* and *NIH* and hold that it can “adjudicate claims ‘based on’ the research-related grants”—
 21 and ordering payment under those grants—it would be condoning a blatant circumvention of the Tucker
 22 Act’s preclusive effect. *NIH*, 2025 WL 2415669, at *1 (quoting *California*, 145 S. Ct. at 968).

23 Lastly, it is not even clear that the Court of Federal Claims would lack jurisdiction. First, “federal
 24 grant agreements a[re] contracts when the standard conditions for a contract are satisfied, including that
 25 the federal entity agrees to be bound.” *Columbus Reg’l Hosp. v. United States*, 990 F.3d 1330, 1338 (Fed.
 26 Cir. 2021). They “set the terms of and receive commitments from recipients” of federal grant programs.

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1 *Boaz Hous. Auth. v. United States*, 994 F.3d 1359, 1368 (Fed. Cir. 2021). Second, the Court of Federal
 2 Claims has jurisdiction over a breach of contract action so long as the plaintiff sets forth “a non-frivolous
 3 allegation of breach of a contract with the government.” *Id.* at 1341. This “separate[s] the issue of subject-
 4 matter jurisdiction, a Rule 12(b)(1) inquiry, from the issue of whether a complainant’s allegations state a
 5 viable claim for relief, a Rule 12(b)(6) inquiry.” *Id.* So the Court of Federal Claims must consider whether
 6 a plaintiff’s “contract-based claims are truly frivolous and, if not,” exercises jurisdiction while moving to
 7 the merits. *Id.* at 1342.

8 Plaintiffs have a non-frivolous claim to third-party beneficiary status, even though Defendants
 9 contend that they should lose on the merits. Plaintiffs certainly think this is the case. As they previously
 10 argued, “[t]he Court . . . could find that Plaintiffs have third party beneficiary status as the intended
 11 beneficiaries of the grant agreements.” Reply in Supp. of Pls.’ Mot. Prelim. Inj. at 8, ECF No. 40. The
 12 Court of Federal Claims would then consider, on the merits, “whether the contract reflects the intent of
 13 the contracting parties to benefit a third party” and then whether there has indeed been a breach. *Columbus*
 14 *Reg’l Hosp.*, 990 F.3d at 1345. And while Defendants take the position that such a claim would not
 15 succeed, that does not render the position so insubstantial as to defeat jurisdiction to even consider the
 16 issue in the Court of Federal Claims. That court therefore has jurisdiction to consider Plaintiffs’ claims.

17 **III. The Equity Termination Class is Also Foreclosed**

18 *NIH* also defeats the Equity Termination Class. First, the contrary to law claim under the APA
 19 naturally flows from the same limited waiver of sovereign immunity as the arbitrary and capricious claim.
 20 *NIH* therefore forecloses those APA claims as well. *NIH*, 2025 WL 2415669, at *1.

21 Second, the Court’s reliance on the First Amendment does not overcome the Tucker Act’s
 22 preclusion. The Court of Federal Claims is capable of adjudicating constitutional claims so long as the
 23 underlying entitlement to funds is a contract, and the purported unlawful breach is rooted in the
 24 Constitution. *See Holley v. United States*, 124 F.3d 1462, 1466 (Fed. Cir. 1997) (“The presence of a
 25 constitutional issue does not erase the jurisdiction of the Court of Federal Claims based on a properly
 26 brought claim under the Tucker Act, or bar the court from considering the constitutional issue in the course

1 of determining whether the [challenged action] was wrongful.”). “All [Plaintiffs’] constitutional claims
 2 are premised on the notion that the United States has some contractual obligation . . . that it has failed to
 3 satisfy.” *See Tucson Airport Auth.*, 136 F.3d at 647. They are thus impliedly precluded.

4 Nor is labeling a claim ultra vires sufficient. As the Supreme Court has recently explained, “[u]ltra
 5 vires review is . . . unavailable if, as is usually the case, a statutory review scheme provides aggrieved
 6 persons ‘with a meaningful and adequate opportunity for judicial review,’ or if a statutory review scheme
 7 forecloses all other forms of judicial review.” *Nuclear Regul. Comm’n v. Texas*, 605 U.S. 665, 681 (2025)
 8 (citing *Bd. of Governors, FRS v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991)); *see Armstrong v. Exceptional*
 9 *Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

10 Thus, for all the reasons that the Tucker Act precludes APA actions for claims that are in essence
 11 contractual, it also precludes ultra vires action. *See, e.g., Sustainability Inst. v. Trump*, No. 25-1575, 2025
 12 WL 1587100, at *2 (4th Cir. June 5, 2025) (“[I]t appears unlikely that Plaintiffs’ ultra vires claims, which
 13 allege the Government violated the Constitution when it terminated or suspended Plaintiffs’ grants, would
 14 provide a detour around the Tucker Act” (citing *Armstrong*, 575 U.S. at 327-28). That Plaintiffs’ requested
 15 relief would operate against the government’s public fisc is further evidence that the ultra vires vehicle is
 16 unavailable. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963).

17 IV. Any Preliminary Injunctive Relief is Barred

18 Lastly, the Supreme Court’s *NIH* decision clarifies that preliminary injunctive relief cannot issue
 19 because Defendants succeed on the balance of the equities. A preliminary injunction risks irreparable
 20 harm to the government and to the public interest by requiring the payment of money that the government
 21 may never recover. “[W]hile the loss of money is not typically considered irreparable harm, that changes
 22 if the funds cannot be recouped and are thus irrevocably expended.” *NIH*, 2025 WL 2415669, at *1
 23 (quotation omitted). Thus, the Supreme Court held in *NIH* that the government faced irreparable harm
 24 because the “plaintiffs d[id] not state that they w[ould] repay grant money if the Government ultimately
 25 prevails.” *Id.* Plaintiffs have not promised to return withdrawn funds, and the government is unlikely to
 26 be able to recover the funds disbursed. So any preliminary injunction should be denied.

1 DATED: September 5, 2025

Respectfully submitted,

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